2003

Salt Lake v. Jean Fred Venord : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

CITY OF SALT LAKE,	:	
Plaintiff/Appellee,	:	
v.	:	
JEAN FRED VENORD,	:	Case No. 20030501-CA
Defendant/Appellant.	:	Appellant is Incarcerated

OPENING BRIEF OF APPELLANT

This is an appeal from a conviction for Alcohol-Related Recklessness, a Class B Misdemeanor, in violation of Utah Code Ann. § 41-6-44 (Supp. 2003), in the Third Judicial District Court, State of Utah, the Honorable Anthony B. Quinn, Judge, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a conviction for Alcohol-Related Recklessness, a Class B Misdemeanor, in violation of Utah Code Ann. § 41-6-44 (Supp. 2003), in the Third Judicial District Court, State of Utah, the Honorable Anthony B. Quinn, Judge, presiding.[1]

This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: Under section 77-29-1 of the Utah Code, a prisoner may compel a 120-day disposition of a pending charge by giving the warden or other appropriate agent a written

[1] A copy of the Minutes of the "Change of Plea; Sentence, Judgment, Commitment" is attached in Addendum A.

request for disposition. The request must give the nature of the charge and the name of the court where the charge is pending. In this case, Appellant Jean Fred Venord met these requirements, but the State failed to prosecute him within 120 days. Did the trial court err in failing to dismiss the case?

Standard of Review: Overall, this Court applies the abuse of discretion standard to a trial court's decision about whether to dismiss charges under the 120-day disposition statute. State v. Coleman, 2001 UT App 281, ¶3, 34 P.3d 790. However, underlying conclusions of law are reviewed for correctness, and underlying findings of fact are reviewed for clear error. Id. at ¶4.

Preservation: This issue was preserved at R. 100-06; 119-22; 160 [2-6].

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution is relevant to the issue on appeal. The Amendment reads, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

U.S. Const. Amend VI.

Article I, section 12 of the Utah Constitution is relevant to the issue on appeal. The provision reads, in pertinent part:

> In criminal prosecutions the accused shall have the right . . . to have a speedy public trial . . . .

UT Const. art. I, § 12.

Section 77-29-1 of the Utah Code, "Disposition of Pending Charge," is determinative of the issue on appeal. The text of that statute is attached in Addendum B.

STATEMENT OF THE CASE

The chronology of events is critical to the issue, so the proceedings are listed in order as follows:

July 6, 2000	Mr. Venord is charged by Information with Driving Under the Influence of Alcohol. R. 2.
August 17, 2000	Mr. Venord fails to appear for arraignment and an Arrest Warrant is issued.[2]
December 12, 2001	A pretrial conference is held, but neither the prosecutor nor the defense attorney appear. R. 23.
December 17, 2001	A pretrial conference is held, but the prosecutor does not appear. R. 27.
December 25, 2001	Mr. Venord writes the court a letter, stating that he is in the Utah County Jail and will not be able to attend a pretrial conference scheduled for January 7, 2002 because he has a court date in Provo at the same time. R. 33.
January 7, 2002	A pretrial conference is held, and Mr. Venord does not appear. Another bench

[2] R. 5. Another warrant was issued two months later, on October 6, 2000 when Mr. Venord failed to appear for a pretrial conference. R. 17.

	warrant is issued. R. 35-37.
May 6, 2002	A pretrial conference is held, and jury trial is scheduled for June 12, 2002. R. 46.
June 5, 2002	Mr. Venord files a Motion to Dismiss on the basis that he was already convicted of charges arising from the same criminal episode. R. 47-65.
June 12, 2002	Trial is continued to July 12, 2002 on stipulation of counsel. R. 84. However, trial is not held on July 12th for reasons not apparent from the record.
October 1, 2002	From the Utah County Jail, Mr. Venord executes and delivers a "Notice and Request for Disposition of Pending Charges," specifying this case by charge and case number. R. 88.
October 9, 2002	Jolie Williams of the Utah County Sheriff's Office forwards the Notice, along with a letter stating that she received the Notice on October 1st, to the Salt Lake City Attorney's Office & Salt Lake District Court. R. 87-88.
October 15, 2002	The Utah County Jail receives a reply from the Salt Lake County Attorney's Office stating that Mr. Venord "has no pending charge(s) in Salt Lake County being prosecuted by the Salt Lake County District Attorney's Office." R. 90.
October 23, 2002	Mr. Venord submits an "Inmate Request and Grievance Form" to the jailers, expressing concern because he had not received acknowledgment of his request for 120-day disposition in this case. R. 89.

October 28, 2002	The jail responds that the Notice was sent to Salt Lake, and attached a copy of the reply received from the Salt Lake County Attorney's Office. R. 89-90.
January 23, 2003	Mr. Venord submits another "Inmate Request and Grievance Form" to the jailers, stating that he had received notice there was a warrant on this case, so he re-filed the disposition notice, but had not received anything back. He expresses his concern that jailers have made mistakes in the forwarding process. R. 91.
January 24, 2003	The Jail responds that Mr. Venord should be more respectful in his requests. Id.
February 6, 2003	Jury trial is set for March 11, 2003. R. 92.
March 11, 2003	Mr. Venord makes a Motion to Dismiss for failure to prosecute within 120 days. R. 98. The court requests briefing. Id.
March 31, 2003	Mr. Venord files a "Motion with Inclusive Memorandum to Dismiss" on the basis that the State failed to prosecute him within 120 days of his written request for disposition. R. 100-06.
April 11, 2003	Court denies the Motion to Dismiss, opining that Mr. Venord should have done something to correct the jail's error in sending the Notice to the wrong court, R. 160 [3-4], and noting that he had some failures to appear. Id. at 5.
April 23, 2003	Mr. Venord files a "Motion to Reconsider Denials of Motion to Dismiss," pointing out that the State has made no showing that it did not receive the Notice of Disposition,

	and even if it didn't receive it, the jail's failure to properly forward it doesn't constitute good cause for failing to bring Mr. Venord to trial within 120 days. R. 119-22. The motion is denied.
May 5, 2003	Mr. Venord enters a conditional plea to the charge of Alcohol-Related Recklessness on condition that he may appeal. R. 136.
May 7, 2003	Mr. Venord is sentenced for Alcohol-Related Recklessness. R. 139, 162-63.
June 4, 2003	Mr. Venord files a timely Notice of Appeal. R. 141.

STATEMENT OF THE FACTS

The facts are not pertinent to the issue in this case. However, the general facts are as follows:

At approximately 746 N. Irving Street in Salt Lake City, Mr. Venold was allegedly operating or in actual physical control of a motor vehicle while intoxicated. R. 2. The Information alleges that a blood or breath test showed he had a "blood or breath alcohol content of .08 grams or greater by weight as shown by a chemical test given within two hours after the alleged operation or physical control . . . ." Id.

SUMMARY OF THE ARGUMENTS

The trial court erred by failing to dismiss this case after the prosecutor missed the

120-day prosecution deadline imposed upon him under the 120-day disposition statute, Utah Code Ann. § 77-29-1 (1999). Under section 77-29-1, a 120-day deadline is imposed once an imprisoned criminal defendant prisoner properly executes and delivers a written request for 120-day disposition of a charge against him. Utah Code Ann. § 77-29-1(1) (1999). In this case, Mr. Venord did this. He requested a 120-day disposition in writing, and specified not only the charge and court, as required by section 77-29-1(1), but also the case number. R. 88. He then delivered the request to an agent of the jail where he was incarcerated, as required by section 77-29-1(1). The agent then documented her receipt of the request. R. 87. Yet, the prosecutor did nothing to forward this case, and by the 120-day deadline, this case was still pending. So, this case should have been dismissed.

However, the trial court did not dismiss this case, and ruled instead that Mr. Venord should have done something more to ensure that the jail properly forwarded his Notice to the appropriate prosecuting agency and court. R. 160 [3-5]. But this ruling is patently wrong. Indeed, it ignores the 120-day disposition statute and all of the interpretive case law. To begin with, the 120-day disposition statute indicates that, once a criminal defendant properly executes and delivers a request for 120-day disposition, his task is over. The burden then shifts to the "warden, sheriff, or custodial officer" to forward the request to the prosecuting attorney and court clerk, and to the prosecuting attorney to prosecute within 120 days. Utah Code Ann. § 77-29-1(2), (3) & (4) (1999). Certainly, the prisoner has no obligation to see that the warden, sheriff, or custodial

officer properly forwards his request. Nor does the prisoner have an obligation to ensure that the request is properly filed in the prosecutor's office and court. The prisoner has no control over these things, and his inability to ensure that they happen cannot work to deprive him of his speedy trial rights embodied in section 77-29-1.

What is more, the prosecutor's burden to move the case forward is not excused simply because of administrative errors or other glitches in the system. State v. Heaton, 958 P.2d 911, 915 (Utah 1998); State v. Petersen, 810 P.2d 421, 426 (Utah 1991); State v. Wagenman, 2003 UT App 146, ¶14, 71 P.3d 184; State v. Coleman, 2001 UT App 281, ¶14, 34 P.3d 790. This is not only well-settled legally, it is also sound policy. The purpose of section 77-29-1 is to compel the prompt prosecution of charges against prisoners so that jailers, sheriffs, the prosecutor's office, and others cannot hold charges over prisoners' heads. State v. Lindsay, 2000 UT App 379, ¶6, 18 P.3d 504; State v. Viles, 702 P.2d 1175, 1176 (Utah 1985). But this is precisely what would happen if administrative errors could be used to excuse the prosecutor from his burden to prosecute within 120 days. So, administrative errors should not be used to justify the failure to prosecute.

In short, the trial court should have dismissed this case on the basis that the prosecutor failed to prosecute this case within 120 days after Mr. Venord executed and delivered his written request for 120-day disposition. The prosecutor failed to show good

cause for the failure to prosecute,[3] and nothing else excused the failure to prosecute. So, the case should have been dismissed with prejudice.[4]

ARGUMENT

MR. VENORD'S CONVICTION SHOULD BE REVERSED BECAUSE THE CITY DID NOT BRING HIM TO TRIAL WITHIN 120 DAYS OF HIS REQUEST FOR DISPOSITION OF THE CHARGE

The trial court should have dismissed the DUI charge against Mr. Venord because the prosecutor did not demonstrate good cause in open court for its failure to bring Mr. Venord to trial within 120 days after he delivered a 120-day disposition request to jailers.[5] Indeed, the prosecutor proffered absolutely nothing to show why Mr. Venord was not tried before the 120-day deadline. Instead, he simply argued in a memorandum that the duty to prosecute never attached because he was not personally aware of the 120-day disposition request. R. 111. Further, during the hearing on the 120-day disposition issue, the prosecutor said absolutely nothing on the issue. R. 160 [2-6]. The discussion took place entirely between the defense counsel and trial court, and focused on the actions of the jailers after they received Mr. Venord's 120-day disposition request. Id. at

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[3] See Utah Code Ann. § 77-29-1(3) & (4) (1999) (prosecutor's failure to prosecute within 120 days may be justified by "good cause shown in open court . . . .").

[4] See Utah Code Ann. § 77-29-1(4) (1999) (if charge not prosecuted within 120 days and no good cause excuses the delay, "the court shall order the matter dismissed with prejudice.")

[5] A copy of the request and the jail's notification letter to the prosecutor and court is included in Addendum C.

3-6. Ultimately, the court decided not to dismiss the case, citing the prosecutor's implication in his memorandum that he was not aware of the request. Id. at 5. However, the 120-day disposition statute and interpretive case law contradict this ruling.

The 120-day disposition statute, Utah Code Ann. § 77-29-1 (1999), stems from federal and state constitutional rights to a speedy trial,[6] and is meant to "more precisely define what is meant by speedy trial . . . ." State v. Lindsay, 2000 UT App 379, ¶6, 18 P.3d 504 (citations omitted). More practically, the statute also prevents law enforcers from "holding over the head of a prisoner undisposed of charges against him." Id. (citations omitted). Further, it compels prompt prosecution,[7] and encourages trials "while witnesses are available and their memories are fresh." Lindsay, 2000 UT App 379, ¶6 (citations omitted).

These goals are implicit in the words of the statute. The statute provides that, whenever a prisoner has a pending charge, the prisoner may compel the prosecutor to try him within 120 days by delivering a written request to the warden or other authorized person:

> (1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a

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[6] State v. Viles, 702 P.2d 1175, 1176 (Utah 1985); State v. Taylor, 538 P.2d 310, 313 (Utah 1975).

[7] Viles, 702 P.2d at 1176.

> written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.
>
> (2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

Utah Code Ann. § 77-29-1(1) & (2) (1999).

Besides outlining the procedure for making a 120-day disposition request, this statute also makes clear that, once the request is made, the defendant's obligation under the statute is over. State v. Coleman, 2001 UT App 281, ¶14, 34 P.3d 790; State v. Petersen, 810 P.2d 421, 424 (Utah 1991). At that point, the prosecutor has the burden of pushing the case forward to meet the deadline. Id. This means that the prosecuting agency may not stand passively by while clerical errors delay the case, or while time simply passes. State v. Heaton, 958 P.2d 911, 915 (Utah 1998). The prosecuting agency must schedule all necessary appearances within the 120-day period, and inform the court that prompt scheduling is necessary because of the 120-day disposition notice. Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d 425. The prosecutor must also actively avoid delays, and if the delays are necessary, the prosecutor must minimize them. Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d 425.

To be sure, the statutory burden to move the case forward sometimes places the

prosecutor in a difficult position. For instance, the prosecutor has an obligation, in some circumstances, to anticipate a 120-day disposition notice when one has not yet been received.[8] Further, administrative errors or other glitches, even if they are unknown to the prosecutor, do not excuse the failure to prosecute within 120 days. The Utah Supreme Court has emphasized this at least twice. In State v. Heaton the Court declared:

> The mere fact that the delay was not caused by the prosecutor has never been considered dispositive because "to hold that good cause is supported by the lone fact that the delay was not caused by the prosecutor would contradict the language in section 77-29-1(4) which places the burden of complying with the statute on the prosecution."

Heaton, 958 P.2d at 915 (quotations deleted). Before that, in State v. Petersen , the Court said:

> In any event, to hold that good cause is supported by the lone fact that the delay was not caused by the prosecutor would contradict the language in section 77-29-1(4) which places the burden of complying with the statute on the prosecution.

Petersen, 810 P.2d at 426. So, even though the prosecutor may sometimes feel frustrated

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[8] See Coleman, 34 P.3d at 796-97 (holding that period of delay occurring when defendant requested that the preliminary hearing be held 30 days from the date of his request, rather than within 10 days of his arrest was not justified by good cause. The Court explained:

> The State knew that this request might precede or come in conjunction with Defendant's Notice, which would initiate running of the 120-day period. Further, the State knew that upon delivery of Defendant's Notice, the Speedy Trial Statute "clearly places the burden of complying with the statute on the prosecutor. Nevertheless, the prosecution did not object, request a finding that the delayed preliminary hearing constituted a delay attributable to Defendant, or make any motion regarding Defendant's request."

(quotations omitted)).

by outside events, the burden nonetheless applies.

Of course, the prosecutor is not without reasonable recourse. The 120-day disposition statute allows for delays which are shown by the prosecutor to have good cause. The statute says:

> After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

Utah Code Ann. § 77-29-1(3) (1999). The question becomes, therefore, whether any delays are supported by good cause. This has been the principal issue in several appeals under the 120-day disposition statute, and some general guidelines have emerged. Most importantly, it has been determined that a good-cause delay is one that is either: (1) caused by the defendant, or (2) "a relatively short delay caused by unforeseen problems arising immediately prior to trial." Coleman, 2001 UT App 281, ¶14; Petersen, 810 P.2d at 426.

As a practical matter, some good-cause delays have included those caused by defendants' motions,[9] those made to accommodate defense counsels' schedules,[10] and those caused by defendants' requests for continuances. State v. Phathammavong, 860 P.2d 1001, 1004-05 (Utah Ct. App. 1993); State v. Bullock, 699 P.2d 753, 756 (Utah 1985). On the other hand, delays that do not have good cause, and therefore do not

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[9] State v. Maestas, 815 P.2d 1319, 1322 (Utah Ct. App. 1991).

[10] Coleman, 2001 UT App 281, ¶8.

justify bringing a defendant to trial after the 120-day period, include those caused by court administrative errors,[11] those caused by a prosecutor's inaction,[12] and those caused by a prosecutor's passive acceptance of delayed scheduling. Coleman, 2001 UT App 281, ¶14.

If a delay is not justified by good cause, the trial court is obligated to dismiss the case with prejudice:

> In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

Utah Code Ann. § 77-29-1(4) (1999).

Finally, appellate review of this issue involves a two-step process. First, it should be determined when the 120-day period commenced and when it expired. Second, if the trial was held outside the 120-day period, it must be determined whether "good cause" excused the delay. Coleman, 2001 UT App 281, ¶6; Heaton, 958 P.2d at 916. If it did not, the conviction must be reversed whether there is a showing of prejudice or not. Petersen, 810 P.2d at 427. Each step of this process is examined in order below.

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[11] Heaton, 958 P.2d at 915.

[12] Petersen, 810 P.2d at 426.

A. During the 120-day Period, Which Began October 1, 2002 and Ended January 29, 2003, the Prosecutor did Nothing to Forward this Case

The first step of the process, determining when the 120-day period commenced and when it ended, is closely guided by the 120-day disposition statute and interpretive case law. Under the statute, a 120-day period begins on "the date of [the prisoner's] delivery of written notice" to the "warden, sheriff or custodial officer in authority, or any custodial officer in authority or any appropriate agent of the same . . . ." Utah Code Ann. § 77-29-1(1) (1999). Once the notice is delivered by the prisoner, "the prosecutor has an affirmative duty [from that point] to have the defendant's matter heard within the statutory period." Heaton, 958 P.2d at 915.

In this case, Mr. Venord delivered his notice on October 1, 2002.[13] This is shown by the Notice and Request for Disposition of Pending Charges, which bears the date of October 1, 2002. R. 88. It is also proved by the letter from Jolie Williams of the Utah County Jail to the Salt Lake City Attorney's Office and Salt Lake District Court. In the letter, Ms. Williams states that the Notice was delivered to her on October 1st:

> On the 1st day of October, 2002, Jean Venord delivered to me the attached demand for disposition. This demand is forwarded to you pursuant to Section 77-29-1, Utah Code Annotated, 1953 as amended, for such further action as you deem appropriate.

R. 87. And so, the date of commencement of the 120-day period is October 1, 2002.

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[13] The trial court made no finding about the commencement date and ending date of the 120-day period. R. 160 [3-6]. It simply ruled that the 120-day period never began because the prosecutor did not know about the Notice. Id.

Of course, it is possible to read into the record some small confusion about the date of commencement. A line at the bottom of the Notice states: "Received by: Jolie Williams Date: 10/9/02." R. 88. However, while this may appear to be inconsistent with Ms. Williams specific statement that Mr. Venord delivered the Notice to her on October 1st, it is actually not a contradiction when the circumstances are taken into account. October 9th is the date that Ms. Williams wrote the letter to the Salt Lake City Attorney's Office and Salt Lake District Court informing them that the 120-day disposition notice had been received. R. 87. So, the October 9th date noted on the bottom of the Notice likely refers to the date that Ms. Williams processed the paperwork, not the date that she actually received the Notice.

Taking the October 1st date, then, and adding 120 days shows that the State's deadline for bring Mr. Venord to trial was January 29, 2003.[14] And, the record shows that Mr. Venord was not tried by that date. Indeed, the record shows that the prosecutor did absolutely nothing to schedule any type of court appearance or do anything to move the case forward between October 1st and January 29th. The last activity that occurred in this case before Mr. Venord delivered his notice on October 1st was the scheduling of a trial for July 12, 2002. R. 84. However, for reasons not apparent from the record, trial was not held on that date, and no action was taken in this case until February 6, 2003, when a jury

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[14] This calculation includes thirty days in October, which does not include the date of October 1st itself; thirty days in November, thirty-one days in December, and twenty-nine days in January.

trial was set for March 11th. R. 92. In the meantime, the 120-day period had come and gone.

Notably, even if the 120-day commencement date used is October 9, 2002, when Ms. Williams sent the letter and Notice, the 120-day deadline was still not met. This is because the October 9th date leads to the deadline date of February 6, 2002,[15] and nothing happened in this case between October 9th and February 6th. On February 6th, as earlier noted, a jury trial was set for March 11th, but nothing else appears in the record between October 9th and February 6th.

Therefore, whichever commencement date is used, the unavoidable conclusion in this case is that the prosecuting agency failed to bring Mr. Venord to trial, or do anything at all to forward his case during the 120-day period.

B. The Prosecutor has not Shown Good Cause for His Delay in Trying This Case

Under the second part of the 120-day disposition review, it must be determined whether good cause justified the delay in prosecution, and in this case, there was no good cause.[16] Indeed, this case sat for years with little effort on the part of the prosecutor to

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[15] This calculation includes 22 days in October, not counting the October 9th date, thirty days in November, thirty-one days in December, thirty-one days in January, and six days in February.

[16] See Coleman, 2001 UT App 281, ¶6 (any delays must be justified by good cause); Heaton, 958 P.2d at 916 (120-day disposition statute mandates that any delays must be justified by good cause).

bring it to trial. To be sure, the prosecutor may not have been at fault for some of the delay that occurred just after Mr. Venord was charged in July of 2000. This is because, during that time, Mr. Venord missed two or three court appearances. R. 5, 17, 33. However, the following year, appearances were missed by the prosecutor, defense counsel, or both. R. 23, 27, 35-37. Additionally, appearances were set unusually far apart. R. 5, 17, 23, 27, 33, 35-37. Not only that, but the first trial date was not even scheduled until June 12, 2002, two years after the Information was filed. R. 84. And then, trial was continued on stipulation of counsel. R. 84. Trial was rescheduled for July 12, 2002. Id. However, trial was not held on that date, nor was it rescheduled. The reasons for this do not appear on record. But it is clear from the record that nothing happened on this case between July 12, 2002 until February 6, 2003 , when another jury trial was finally scheduled. R. 92. During this time the prosecutor did absolutely nothing to further the case.

During this time, Mr. Venord did what he could to move the case along. He had been in jail since at least the end of November, 2001, R. 18, 27, 33, and so he was readily available for appearances. After the July 12, 2002 trial was missed, he patiently waited nearly three months. Then, on October 1, 2002, he finally executed and delivered a Notice and Request for Disposition of Pending Charges. R. 88.

Notably, the Notice was properly executed and delivered. The Notice was in writing. Id. Also, Mr. Venord did much more than simply list that he had a DUI in Salt

Lake City, as required under the 120-day disposition statute. Utah Code Ann. § 77-29-1(1) (1999). He listed the case number, the judge, and the charges. R. 88. At that point, he had done everything required of him under the statute, and he did not need to do more. See Utah Code Ann. § 77-29-1(1) (1999) (outlining steps for proper execution and delivery). Nonetheless, he attempted to follow up on his Notice to make sure it was being processed properly. R. 89, 91. Twice he filed an "Inmate Request and Grievance Form" asking about the status of his Notice and requesting proper delivery. R. 89, 91. However, he simply got a note from jail personnel saying "In the future it would behoove you to be more respectful in your request." R. 91.

Despite all of this, the trial court refused to dismiss this case, as required under the 120-day disposition statute. Utah Code Ann. § 77-29-1(4) (1999). Instead, the court ruled that the 120-day period never attached because the prosecutor was unaware of Mr. Venord's 120-day Notice. R. 160 [4]. In response, the defense counsel pointed out that, under the case of State v. Heaton, administrative errors do not excuse the prosecutor from complying with the 120-day period. Id. However, the court opined that **Heaton** is distinguishable from the facts of this case, and said that Mr. Venord should have done more to see that the jailers sent his Notice to the proper people. Id. at 4-5.

This ruling is insupportable. It is well-settled that, under the 120-day disposition statute, a prisoner's obligation ends once he complies with the notice requirements. That is, his obligation ends once he delivers "to the warden, sheriff or custodial officer in

authority, or any appropriate agent of the same" a written demand for 120-day disposition specifying the nature of the charge and the court where the charge is pending. Utah Code Ann. § 77-29-1(1) (1999). At that point, the burden shifts to the prosecutor to try the case within 120 days. Heaton, 958 P.2d at 915; State v. Wagenman, 2003 UT App 146, ¶14-15, 71 P.3d 184; Coleman, 2001 UT App 281, ¶14. And, it is the burden of the "warden, sheriff or custodial officer" to forward the request to the appropriate "prosecuting attorney and court clerk." Utah Code Ann. § 77-29-1(2) (1999), and to the prosecutor to try this case within 120 days.

The failure of these people to carry out their responsibilities under the statute cannot work to the disadvantage of Mr. Venord to deny him his speedy trial rights. Once he submitted his Notice, he no longer had any control over the processing of his request. He was neither capable of, nor responsible for, making sure his request was properly directed.

This is precisely the reason that this Court and the Utah Supreme Court have emphasized that errors by jail agents, the sheriff, the prosecutor's office, or the court clerk in fulfilling their duties under section 77-29-1 are not considered good cause for delay. Heaton, 958 P.2d at 915; Wagenman, 2003 UT App 146, ¶14-15; Coleman, 2001 UT App 281, ¶14. If such errors were considered good cause, then a defendant's right to a speedy trial could be routinely violated without recourse. Jail agents, sheriffs, clerks, the prosecutor's office, and others could either deliberately or inadvertently overlook

their delivery, filing, and notification duties, and effectively nullify the speedy trial right. And, this is what the legislature sought to avoid in enacting section 77-29-1. Lindsay, 2000 UT App 379, ¶6. So, errors of this type cannot work to toll the 120 days, and thereby deny a criminal defendant his right to a speedy trial.

In this case, it is unclear what sort of administrative error occurred. Possibly, clerks at the Salt Lake City prosecutor's office or court received the Notice but did not file it properly. Or perhaps jail agents did not give the right delivery address to the sheriff or post office for delivery. Or maybe the sheriff did not deliver the Jail's letter and Notice to the correct prosecuting office and court.[17] If that is the case, it appears that the District Attorney's Office erred in failing to inform the Salt Lake City prosecutor's office of the letter and Notice. In any event, it certainly does not appear that the service was done with personal service or with certified mail and return receipt requested, as required under the 120-day disposition statute. Utah Code Ann. § 77-29-1(2) (1999). Worse, the jail made no effort to respond to Mr. Venord's efforts to check on the status of the Notice and determine whether it was properly delivered. R. 89, 91.

However, the precise errors occurring between the jail agents, sheriff's office, prosecuting offices and court clerks are inconsequential. What is clear is that Mr. Venord met the requirements of the 120-day disposition statute in executing and delivering his Notice, and yet the City did nothing to move the case forward from the date of

[17] The letter itself was addressed to the proper court of Salt Lake City, but delivered to the District Attorney's Office. R. 87, 90. So, there may have been a delivery error. R. 87.

commencement on October 1, 2002 to the 120-day deadline of January 29, 2003. Further, it made no showing of good cause for its failure to do so. And so, the prosecutor's breach of duty was unjustified.

Finally, the trial court's comment that Heaton, which holds that clerical errors do not justify a failure to prosecute within 120 days, is distinguishable from this case is incorrect. The trial court acknowledged the Heaton case, but opined that clerical errors which keep the prosecutor from becoming personally aware of the 120-day disposition notice justify the failure to prosecute. The court stated:

> The Heaton case is "very [inaudible] distinguished from this case. The prosecution was aware of the 120 day disposition, but it was one of those cases that fell between the cracks and was passed from one Judge to the other.
>
> The prosecution was still aware of it and what the Court said in Heaton is, "Clerk error doesn't excuse by the Court, Doesn't excuse the prosecutor from following through and making sure that the 120 day disposition date is met."
>
> What it doesn't – it isn't a blank statement that regardless of who makes the error it is not just cause, because the Heaton case makes very clear that it was the prosecutor's responsibility to prosecute the case, and at least in that case the prosecutors were. Now, that's very different from this case.

R. 160 [5].

However, contrary to this ruling, Heaton is actually directly on point. In Heaton, the defendant was charged with robbery and was appointed counsel from the public defender's office. Heaton, 958 P.2d at 913. He initially waived his preliminary hearing and pled not guilty at his arraignment. Id. Then he was placed in prison and delivered a

120-day disposition notice to prison agents. Id. On August 30th, about two months after his arrest, he made a request for a preliminary hearing and a date was set. Id. The preliminary hearing was held September 9th, and the defendant was bound over. Id. A second arraignment was scheduled for September 27th, but on that date the defendant asked the judge to recuse himself. Id. The judge did so and ordered the case reassigned. Id.

But due to a clerical error in the court clerk's office, the case was not reassigned. Id. Instead, it simply sat unnoticed until the end for November. Id. Then, a witness called the court asking about the trial date, and the court sent the parties a notice of trial-scheduling conference on December 7th. Id. There, the court attempted to set a trial date for January 19th, but both parties had a scheduling conflict and so the dates of February 16th and 17th were set. Id. Ultimately, trial was not held until April 20th and 21st. Id.

On review, the Utah Supreme Court held that the court clerk's error in overlooking the case between September 27th and the end of November did not constitute good cause for the failure to prosecute. Heaton, 958 P.2d at 915 (quotations deleted). This is because the 120-day disposition statute places the burden of moving the case forward on the prosecution:

> We agree with the State that it is not responsible for the administrative mistakes of the court. Nevertheless, it *is* responsible for complying with section 77-29-1. Because the statute places on the prosecutor *alone* the burden of bringing the case to trial within the 120-day period, the prosecutor's duty must be independent of the court's docketing system.

Id. (emphasis added).

The Court then made two points. First, the prosecutor in that case was personally aware of the 120-day disposition statute but did nothing to move the case forward. Id. Second, in any event, once a prisoner delivers his notice to an authorized agent, the prosecuting agency has an obligation to have the matter heard within the statutory time frame. Id. This means the prosecutor must take an active role in scheduling appearances and moving the case along:

> When a prisoner delivers a written notice pursuant to the detainer statute, the prosecutor has an affirmative duty to have the defendant's matter heard within the statutory period. Implicit in this duty is the duty to notify the court that a detainer notice has been filed and to make a good faith effort to comply with the statute. This is not to say that the prosecutor must succeed, for "good cause" may support the prosecutor's failure to comply. However, where the prosecutor's failure is inaction - in this case, doing nothing whatsoever to bring Heaton's case to trial within the statutory period - the trial court may not conclude that the prosecutor's failure to supported by "good cause."

Id. at 915-16.

Heaton is not distinguishable from this case because the fact patterns in both cases are similar. In fact, the delay caused by the prosecutor's inaction in this case was actually much more grievous than in Heaton. In Heaton the delay caused by the court's clerical error and the prosecutor's inaction was only about two months, from the September 27 th arraignment to the December 7th scheduling conference. Id. at 913. But in this case, nothing at all occurred between June 12, 2002, when trial was postponed, R. 46, and February 6, 2003, when a new trial was finally scheduled. R. 92. During this nearly

eight-month period the 120-day disposition period came and went, and nothing happened. Indeed, this case was pending for two years before that. R. 2. The prosecutor's inaction in this case is much more marked than in Heaton, and so the court's opinion that Heaton doesn't apply is insupportable.

Of course, the Court in Heaton did note that the prosecutor in that case knew of the 120-day disposition notice during the period of clerical error. Heaton, 958 P.2d at 915. But this does not distinguish Heaton from this case. This is because, in this case, there was never any evidence that the prosecutor did not receive the 120-day disposition notice. The only suggestion of this is in the prosecutor's "Memorandum in Opposition to Defendant's Motion with Inclusive Memorandum to Dismiss." In that memorandum, the prosecutor stated that "[i]t would be unjust to penalize Salt Lake City for the delay in addressing the defendant's 120 day disposition when Salt Lake City was not aware of the request for action."[18] However, this does not show that the Salt Lake City prosecutor's office did not receive the 120-day disposition notice. The notice may have been misfiled, or the prosecutor may not have reviewed the file during the period of delay. And, it was not shown in the motion hearing that the Salt Lake City prosecutor's office did not receive the notice. R. 160 [3-6]. Certainly, the trial court did not make a specific factual finding as to that issue. Id. And so, it cannot be assumed that the prosecutor's office did not receive the notice.

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[18] R. 110. The prosecutor repeats this later in the memorandum. R. 111.

At any rate, whether the prosecutor received the notice is beside the point. Mr. Venord did everything required of him under section 77-29-1, R. 88, and so the burden shifted from him to the State to try with case within 120 days. Section 77-29-1 specifically places the burden of notifying the prosecutor and court on the "warden, sheriff or custodial officer," and the burden of prosecuting within 120 days on the prosecutor. Utah Code Ann. § 77-29-1(2), (3) & (4) (1999). If any of these people fail to perform their statutory obligations the case must be dismissed with prejudice. Utah Code Ann. § 77-29-1(4) (1999).

This is clear from both Heaton and other holdings on the issue. For instance, in State v. Coleman this Court clarified that the prosecutor's statutory obligation to prosecute within 120 days attaches even when a prosecutor has not yet received a 120-day disposition notice. Coleman, 2001 UT App 281, ¶14. In that case, the defendant delivered his notice to the prison agent on November 15 th, and this court held that a delay occurring immediately after could not be justified even though the prosecutor had not yet received the notice. Id. This court explained:

> Simply put, the prosecution, knowing that it had or could soon have an obligation to bring the matter to trial within 120 days, may not passively accept a defendant's delay of the preliminary hearing, and then turn around and claim the delay kept the prosecution from meeting its burden.

Id.

Further, in State v. Petersen, the Utah Supreme Court held that the prosecutor's failure to object to a trial date that was set more than 218 days after the commencement

date of the 120-day period was a breach of duty. Petersen, 810 P.2d at 424. As in Heaton, the court explained that the statutory duty to prosecute means that the prosecutor must take affirmative steps to try a case within the 120-day period. Id. Inaction does not excuse a delay. Id. This was emphasized again recently in State v. Wagenman, where this Court reiterated that the duty to prosecute means the prosecutor must act affirmatively to try a case within the 120-day period and even anticipate the filing of a 120-day notice. Wagenman, 2003 UT App 146, ¶12-14. And so, under these cases, administrative errors cannot be used to excuse the prosecutor from the duty to make effort to try a case within the 120-day period.

All of this shows that, in this case, the prosecutor had no legally-acceptable showing of good cause for his failure to try Mr. Venord within 120 days after he delivered a written request for disposition to jail agents. Absolutely no action was taken on this case during the eight-month period that included the 120-day period, and the prosecutor did nothing to move the case forward. And so, the trial court should have dismissed this case with prejudice.

CONCLUSION

In light of the above, Mr. Venord respectfully requests that this Court reverse his conviction for failure to prosecute within 120 days after the written request for disposition of charges.

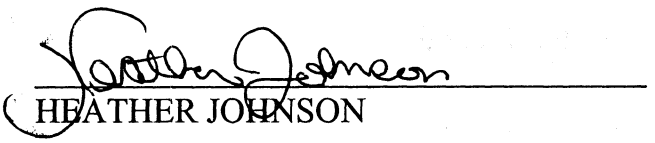
SUBMITTED this 5th day of September, 2003.

HEATHER JOHNSON
Attorney for Defendant/Appellant

MICHAEL MISNER
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Salt Lake City Prosecutor's Office, 349 South 200 East, Suite 500, Salt Lake City, Utah 84111, this 5th day of September, 2003.



HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Salt Lake City Prosecutor's Office as indicated above this _____ day of September, 2003.

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY, Plaintiff,	:	MINUTES CHANGE OF PLEA SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 005912689 MD
JEAN FRED VENORD, Defendant.	:	Judge: ANTHONY B. QUINN Date: May 7, 2003

PRESENT
Clerk: jillenew
Prosecutor: CHIN, AUGUSTUS
Defendant
Defendant's Attorney(s): MISNER, MICHAEL

DEFENDANT INFORMATION
Date of birth: December 2, 1968
Video
Tape Number: video Tape Count: 8:54

CHARGES

1. DUI REDUCED TO RECKLESS-ALC/DRUG RELATED (amended) - Class B Misdemeanor
Plea: Guilty - Disposition: 05/07/2003 Guilty

Court advises defendant of rights and penalties.
Defendant waives time for sentence.

Change of Plea Note
Deft signed waiver of rights.

Case No: 005912689
Date: May 07, 2003

Credit is granted for time served.

SENTENCE JAIL RELEASE TIME NOTE

Deft given CTS to close case. Order to release sent down to the jail

Dated this 28 day of August, 2003

ANTHONY B. QUINN
District Court Judge

By _____
STAMP USED AT DIRECTION OF JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH
DATE: 8-28-03

DEPUTY COURT CLERK

ADDENDUM B

CHAPTER 29

DISPOSITION OF DETAINERS AGAINST PRISONERS

77-29-1. Prisoner's demand for disposition of pending charge — Duties of custodial officer — Continuance may be granted — Dismissal of charge for failure to bring to trial.

(1) Whenever a prisoner is serving a term of imprisonment in the state prison, jail or other penal or correctional institution of this state, and there is pending against the prisoner in this state any untried indictment or information, and the prisoner shall deliver to the warden, sheriff or custodial officer in authority, or any appropriate agent of the same, a written demand specifying the nature of the charge and the court wherein it is pending and requesting disposition of the pending charge, he shall be entitled to have the charge brought to trial within 120 days of the date of delivery of written notice.

(2) Any warden, sheriff or custodial officer, upon receipt of the demand described in Subsection (1), shall immediately cause the demand to be forwarded by personal delivery or certified mail, return receipt requested, to the appropriate prosecuting attorney and court clerk. The warden, sheriff or custodial officer shall, upon request of the prosecuting attorney so notified, provide the attorney with such information concerning the term of commitment of the demanding prisoner as shall be requested.

(3) After written demand is delivered as required in Subsection (1), the prosecuting attorney or the defendant or his counsel, for good cause shown in open court, with the prisoner or his counsel being present, may be granted any reasonable continuance.

(4) In the event the charge is not brought to trial within 120 days, or within such continuance as has been granted, and defendant or his counsel moves to dismiss the action, the court shall review the proceeding. If the court finds that the failure of the prosecuting attorney to have the matter heard within the time required is not supported by good cause, whether a previous motion for continuance was made or not, the court shall order the matter dismissed with prejudice.

ADDENDUM C

Utah County Sheriff

DAVID R. BATEMAN, SHERIFF

No hrng

Cover Letter
NOTICE OF 120 DAY DISPOSITION

00591268 9

TO:Salt Lake City Attorney's Office & Salt Lake District Court

FROM: Jolie Williams

DATE: October 9, 2002

On the 1st day of October, 2002, Jean Venord delivered to me the attached demand for disposition. This demand is forwarded to you pursuant to Section 77-29-1, Utah Code Annotated, 1953 as amended, for such further action as you deem appropriate.

STREET ADDRESS: *3075 N. Main, Spanish Fork, Utah 84660* PHONE: *(801) 343-4000*

UTAH COUNTY SHERIFF'S OFFICE
UTAH COUNTY JAIL

NOTICE AND REQUEST FOR DISPOSITION OF PENDING CHARGES

TO: JAIL COMMANDER, UTAH COUNTY JAIL

I, JEAN F. VENORD, do hereby request that the Utah County Sheriff's Office forward a copy of this request for 120 day disposition of the following charges pending against me, pursuant to U.C.A 77-29-1:

	CHARGE	CASE #	COURT
1.	open container	# _____	pending in SALT LAKE
2.	c/s show cause	# 001911720	pending in SALT LAKE - warrant
3.	DUI	# 005912689	pending in SALT LAKE
4.	_____	# _____	pending in _____
5.	_____	# _____	pending in _____
6.	_____	# _____	pending in _____

I request that you forward notice of this request to the appropriate prosecuting attorneys and court clerks by certified mail, return receipt requested, at my expense (charged to my inmate account).

Dated this 1 day of October, 2002.

Jean Venord
Inmate's signature

Received by: Julie Williams Date 10/9/02